Foreign Direct Investment Rules in Selected European Countries—An Overview

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INTRODUCTION

In the past years there has been an increasingly intense debate within the EU as to how to build an open, sustainable, fair and rules-based global trade order through international cooperation whilst protecting EU companies and key sectors against foreign countries or companies that raise concerns for security and public order. Reports of opportunistic investments during the current pandemic have heightened such concerns.

For M&A transactions, foreign direct investment ("FDI") screening has consequently and increasingly become an important element in **M&A planning** when the target has European operations. Third-country foreign direct investments in the EU in strategic industries, infrastructure and key future technologies, or other assets that are deemed of critical importance, need not only consider **merger control** in their planning, but also whether they will attract scrutiny under **national FDI rules**.

The EU Commission ("Commission") has published an overview of the current national FDI screening mechanisms applicable at Member State level. So far, only 13 out of the 27 EU Member States (plus the UK) possess FDI screening mechanisms on the grounds of security or public order. Such mechanisms differ among Member States: while some have very comprehensive FDI screening mechanisms in place (*e.g.*, Germany, France), other Member States regulate certain sectors such as defence, energy, water, telecom (*e.g.*, the Netherlands, Denmark). Others, such as Sweden, for example, have no FDI screening mechanism in place yet.

In 2019, the European Union enacted the EU Screening Regulation 2019/452 ("EU Regulation"), which will apply from 11 October 2020 onwards. The EU Regulation does not stipulate that the Member States lacking an FDI screening mechanism would need to introduce one, although its effect will be to encourage that to happen. It rather aims, *inter alia*, at:

- introducing basic standards to be followed by Member States that have a national FDI screening mechanism, *e.g.*, rules and procedures, timeframes, transparency, non-discrimination between third countries, opening judicial review against screening decisions;

- ensuring FDI in certain specific **sectors** is subject to review, such as:

  - critical infrastructure, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, land and real estate critical for the use of such infrastructure;

  - critical technologies and dual-use systems, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy, storage, quantum, nuclear technologies, nanotechnologies and biotechnologies;

  - supply of critical inputs, including energy or raw materials, and food security;

  - access to sensitive information, including personal data;

  - freedom and pluralism of the media;

  - ensuring EU-wide coordination and cooperation to enable Member States and the Commission to exchange information and raise concerns related to specific investments; and

- allowing the Commission to issue an opinion when an investment threatens the security or public order of more than one Member State, or on investments affecting strategic EU projects or programs.

In response to the pandemic and related concerns regarding opportunistic takeovers of European companies struggling financially, the Commission issued a further guidance paper on 25 March 2020 calling upon national governments to vigorously enforce (and adopt if necessary) their FDI screening mechanisms to protect sensitive European assets during the crisis, particularly healthcare and research-related European assets. More information on the guidance paper can be found here.

This is the Commission's strongest statement yet with regard to FDI screening and can be seen as forming part of the wider European (and global) movement toward state interventionism and national protectionism on the grounds of security and public order.[1]

Some of the key practical implications of FDI restrictions include often lengthy or uncertain review periods, detailed information gathering and possible sanctions for non-compliance. The effects vary between Member States where, for example, review periods can range from 30 business days to 7 months.

Plus, this area of law is likely to develop rapidly in the coming months as existing regimes are expanded or clarified and new regimes enter into force. The UK Government for example has just recently announced that a new national security and investment bill will be brought forward to the UK Parliament in the near future. If passed, this new bill will further strengthen the UK's FDI screening mechanism. On 8 June 2020 it was reported that the new legislation will require UK businesses to notify attempted foreign takeovers that could pose national security risks.

The rapidly changing FDI environment in Europe can also be evidenced in Poland and Hungary: The Polish government issued on 22 May 2020 a proposal for a comprehensive reform of its FDI regime. Hungary adopted a new foreign investment screening regime on 25 May 2020 with similar coverage.

Parties to M&A transactions should carefully consider risk allocation around pre-closing covenants, failure to obtain approvals, and further changes in law—much in the same way that merger control and other regulatory approvals are routinely addressed in transaction agreements.

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[1] See further detail in our client updates "Covid-19 and Foreign Direct Investment: EU Sees Stricter Controls", and "India's New Restriction on Chinese Foreign Investment".

A summary of some of the relevant information is displayed below for several European jurisdictions and discussed in more detail in the following chapter.[2]

	Investment Thresholds	Protected Sectors	Mandatory Notification	Review Length	Standstill Obligation	Sanctions
Germany	25% voting rights or assets, 10% in protected sectors	Defence, critical infrastructures, telecommunication, healthcare, media, etc.	Yes, when investment is made in protected sectors	Two to seven months	Yes, in the defence sector, in future in all protected sectors	In the future: fines or imprisonment of up to five years
UK	25% share of supply or turnover of domestic company greater than £70 million or £1 million in protected sectors	Military and dual use, multi-purpose computing hardware, quantum technology	No, notification is voluntary	40 days to 24 weeks	No, but could impose obligations to undo integration	Fines for ignoring information requests
France	25% voting rights (10% until 31 December 2020 for investments in listed companies) or purchase of whole or part of a business line or acquisition of controlling interest	Defence, dual-use, surveillance, gambling, critical infrastructures, R&D, etc.	Yes, when thresholds are met	30-75 business days	Yes, for the duration of the review process	Injunctions, fines equalling double the value of the investment or 10% of the annual turnover of the domestic company or €5 million for legal persons, imprisonment

[2] *Disclaimer*: With respect to jurisdictions other than Germany, UK and France we have relied upon our own research and local counsel review, and such summary is not meant to give any advice but only a general overview over the FDI screening mechanisms in place.

	Investment Thresholds	Protected Sectors	Mandatory Notification	Review Length	Standstill Obligation	Sanctions
Italy	For non-EU entities, 10% voting rights or investment value representing 10% of domestic company's corporate capital. For EU entities acquisition of a controlling interest	Defence, dual-use, critical infrastructures supplies and technologies, agriculture, media, finance, etc.	Yes, when thresholds are met	45-60 business days	Yes, for the duration of the review process	Fines of 1% of the cumulative global turnover of all entities involved up to double the value of the transaction, voting suspensions
Spain	10% share capital	Defence, critical infrastructures, technologies and supplies, sensitive data, media	Yes, when investment is made in protected sectors	Six months	Yes, when investment is made in protected sectors	Fine of €30,000 up to the value of the transaction or a public or private reprimand
Netherlands	No general FDI screening mechanism in place	Defence, energy, telecommunication, drinking water, nuclear energy, mining, underground gas storage	No	–	No	None

GERMANY

FDI screening in Germany is governed by the Foreign Trade and Payments Act ("Act") and its accompanying ordinance, the Foreign Trade and Payments Ordinance ("Ordinance").

FDI screenings in Germany have become increasingly important in recent years. Reviews have become more restrictive given an increased number of foreign acquisitions of German key technologies and infrastructure. In 2018, 78 FDI applications have been made, and in 2019 a total of 106. The trend will increase in the next years, with approximately 150 applications to be expected per year.

On 8 April 2020, the German government adopted a draft to amend the Act ("Draft Act"), which is expected to become effective in October 2020.

On 25 May 2020, the Ordinance was changed as a response to the COVID-19 pandemic and the Commission guidance mentioned above. The Ordinance was originally planned to be reformed in a more comprehensive manner, but such changes will be passed later in the year to take account of the additional changes brought by the EU Screening Regulation.

- **What are the applicable thresholds?**

  In defence sectors, acquisitions of more than **10% of the voting rights or assets** in a German company (or parts thereof) by a non-German investor must be notified with the Federal Ministry of Economics ("BMWi").

  In non-defence sectors that are specially protected (see below), acquisitions of more than **10% of the voting rights or assets** in a German company (or parts thereof) by EU foreign investors must be notified with the BMWi as well.

  In other non-defence sectors (*i.e.*, such that are not listed as specially protected), acquisitions of **25% of the voting rights or assets** in a German company by foreign investors can also be subject to review by the BMWi if public order or security in Germany is affected.

  Voting agreements with other foreign investors are counted against the threshold.

  Direct and indirect acquisitions by foreign investors, *e.g.*, through an intermediary, are caught by German FDI screening in order to avoid potential circumventions. The residence of the ultimate economic beneficiary is relevant. Unless defence industries are involved, investors based in the EU and EFTA are not considered foreign. In defence industries, all non-domestic investors are considered foreign.

- **Which industries are affected?**

  Generally, any transaction concluding with the purchase of 25% of the voting rights of a German company can be subjected to an investment review, regardless of which industrial field it can be ascribed to, so long as public order or security in Germany is affected.

Certain sectors, however, enjoy **special protection** and acquisitions of 10% of the voting rights or assets in a domestic company are subject to a mandatory FDI filing with the BMWi. Such sectors include:

- military weapons and equipment as defined in the War Weapons List;
- specially designed engines or gears to drive battle tanks or other armoured military tracked vehicles;
- cryptographic systems that process classified State information;
- dual-use goods or certain military products subject to export restrictions;
- operators of **critical infrastructure** in the areas of energy, water, food, information technology and telecommunications, health, finance and insurance, transport and traffic, that reach a certain legally defined minimum of significance;
- developers of software **specifically designed for critical infrastructure** mentioned above (*e.g.*, software intended for use in power plants, sewage plants, data storage, payment transactions, *etc.*);
- operators of telecommunication facilities and developers of technical implementations for the surveillance of telecommunication;
- large data centres and cloud computing providers;
- E-healthcare providers that possess a special telematics license;
- media companies (*e.g.*, radio, television, newspapers).

As a result of the COVID-19 pandemic, the Ordinance **expanded** this list of specially protected sectors to also include:

- services provided to the communications infrastructures operated by the Federal Agency for Public Safety Digital Radio;
- production and development of personal protective equipment within the meaning of Article 3 of EU Regulation 2016/425 (*e.g.*, protective clothing, face masks);

- essential drugs for the provision of medical care to the general population, including production facilities and technologies necessary for the creation or development of these drugs and their agents;

- medical devices or products that are intended for the diagnosis, prevention, supervision, prediction, prognosis, treatment or alleviation of life-threatening and highly infectious viral diseases;

- in vitro diagnostics that provide information related to life-threatening and highly infectious viral diseases.

An additional amendment to the Ordinance will complement the above list of critical sectors by including a number of critical technologies set out in the EU Regulation, including artificial intelligence, robotics, semiconductors, cybersecurity, and biotechnologies.

- **What is the filing process and is clearance granted in writing?**

Foreign investors are **obliged to file** with the BMWi transactions in defence sectors and in non-defence sectors that are specially protected, as listed above. Failure to submit mandatory filings can lead to sanctions (see below).

In non-defence sectors that are *not* subject to special protection, foreign investors may consider applying for a "**certificate of non-objection**", which—if granted—testifies the BMWI approval of the acquisition. This certificate is deemed to have been granted if the BMWI does not initiate an in-depth review of the transaction within **two months** after receiving the application.

If uncertain whether a transaction may pose a risk to the German security or public order (and if not included in the list of specially protected sectors) the foreign investor may decide to apply to the BMWi for a certificate of non-objection as a precautionary measure and to remove legal uncertainty. If not notified, the BMWi may conduct a review into a transaction up to **five years** after its signing.

If the BMWi finds that a transaction impacts security or public order of Germany, it may prohibit it in total or in part or impose restraining orders.

- **What are the review periods?**

Whether in non-defence or defence sectors that are subject to special protection, the BMWi has **three months** to decide whether it will initiate an in-depth review,

starting with the official submission of the (mandatory) application. Otherwise the approval is deemed to have been granted.

The BMWi initiates in-depth reviews if it identifies potential concerns that the security or public order in Germany may be affected.

If the BMWi decides to initiate an in-depth review, the periods are as follows:

- in defence matters, **three additional months**;
- in non-defence sectors, **four additional months**.

The additional period starts upon receipt of the complete transaction documentation at the request and full satisfaction of the BMWi, and it can be suspended during the remedy negotiations.

If the foreign investor decides to voluntarily apply for a certificate of non-objection (*i.e.*, in non-defence sectors that are *not* subject to special protection), the initial review period is shortened to two months.

- **Is there a standstill obligation?**

Defence-related transactions must be notified with the BMWi before closing (standstill obligation). Such transactions are considered **invalid** until the BMWi expressly permits the transaction or does not block it within the review periods described above.

Non-defence-related transactions in sectors that are specially protected can in principle be currently closed before consulting with the BMWi. However, they become invalid with retrospective effect if prohibited by the BMWi, in which case it may unwind the transaction.

Once the Draft Act is enacted, the **standstill obligation will be extended to all transactions** involving one of the above-listed protected non-defence sectors and that are subject to a mandatory filing. Such transactions will be temporarily void unless expressly permitted by the BMWi. If prohibited, the transaction will become legally void.

- **Are there any sanctions?**

Foreign investors acting against BMWi orders may risk fines.

The Draft Act introduces sanctions in the form of monetary fines and imprisonment of up to five years if a party of the transaction attempts to bypass the standstill obligation. Particularly, without the (deemed) approval of the BMWi, it is expressly prohibited:

- to allow the foreign investor to exercise voting rights over the domestic company;
- to distribute earnings to the foreign investor; and
- grant the foreign investor access to information related to national security interests.

The Draft Act grants the BMWi the right to declare certain information of the domestic company as significant to security or public order so as to prevent the premature execution of the transaction.

- **Expected changes due to EU Screening Regulation 2019/452**

Once the Draft Act is enacted, the standard applied to FDI screening in Germany will be tightened: the test will be if a transaction is "likely to affect" security or public order in Germany an actual endangerment will not be necessary any longer.

In addition, the BMWi will be allowed to impose restrictions on acquisitions that not only affect Germany, but also other Member States or EU projects or programs.

As also required by the EU Regulation, the Draft Act enables the BMWi to take into particular consideration whether the foreign investor:

- is directly or indirectly controlled by the government of a foreign state;
- has in the past carried out activities in Germany or other Member States that posed a risk to their security or public order; and whether
- there is a substantial risk that the foreign investor committed a crime within the meaning of Section 123(1) of the German Act against Restraints of Competition (*e.g.*, forming criminal organisations, terrorism financing, money laundering, fraud, bribes, human trafficking, *etc.*).

Finally, the German government will in a second amendment of the Ordinance add additional critical technologies to the index of specially protected non-defence

sectors as provided by the EU Regulation, including artificial intelligence, robotics, semiconductors, cybersecurity, biotechnologies *etc.*

UK

The UK does not have a formal distinction between domestic and foreign investment. However, there are a number of means by which the government can intervene on the grounds of public interest if a transaction falls within the merger control thresholds. In practice, interventions on the grounds of public interest have historically been relatively rare but may be more likely in some circumstances when foreign investors are involved, particularly in relation to national security. Since 2002, the government has made 20 public interventions on takeovers, 12 of which were due to national security concerns and the majority of which were relatively recent.

The UK government is currently consulting on changing the law to introduce a new public interest power that would introduce a system similar to that in operation in the United States and Australia.

- **What are the applicable thresholds?**

  Merger notification thresholds in the UK are generally based on share of supply (*i.e.*, the transaction creates or enhances a 25% share of supply or purchases in the UK) or turnover (the target UK turnover exceeds £70 million). If the transaction involves the military and dual use, multi-purpose computing hardware or quantum technology sectors, the relevant turnover threshold is lowered to £1 million and the share of supply test can be satisfied by the target alone.

  Once the merger notification thresholds are met, the UK government can intervene on public interest grounds. Public interest considerations are listed in the relevant legislation and include interests of national security and defence, the need for accurate news and free expression, sufficient plurality of the media, availability and quality of broadcasting, media standard, and regulation of the UK financial system. It is also worth noting that the Secretary of State has the power to intervene in transactions on the basis of a consideration that, in their opinion, ought to be specified even if it is not listed in the legislation.

  The Secretary of State may also intervene where the UK jurisdictional thresholds are not met, but where the transaction involves a government contractor that holds or receives confidential defence-related information or where issues of media plurality arise.

The UK Secretary of State can also intervene on public interest grounds in deals where the UK thresholds are not met but where the Commission instead has competency.

The intended new FDI regulations will reportedly require UK businesses to declare when a foreign actor attempts to purchase more than 25% of the shares of a UK entity, purchase assets or intellectual property or gain "significant influence".

- **Which industries are affected?**

The legislation applies to all industries provided a "public interest consideration" arises. However, some sectors are more likely to be affected than others. Sectors that are closely linked to the public interest (such as defence and the media) are more likely to be affected. The merger thresholds are also lower for certain sectors (see above).

- **What is the filing process and is clearance granted in writing?**

Merger notifications to the Competition and Markets Authority ("CMA") in the UK are voluntary. However, when a transaction is notified to the CMA, the parties must follow the prescribed statutory procedure and provide all of the information requested in the merger notice.

The first stage in the filing process is a Phase 1 investigation. During Phase 1, the Secretary of State is able to issue an intervention notice if they have reasonable grounds to suspect that the public interest tests are satisfied. The CMA then reports to the Secretary of State and a decision is taken on clearance or a referral to a Phase 2 investigation. For transactions that move to Phase 2, the CMA will continue to report to the Secretary of State. The Secretary of State has the ultimate decision on public interest mergers.

- **What are the review periods?**

Phase 1 and 2 reviews by the CMA are subject to statutory deadlines (40 working days and 24 weeks respectively). However, these deadlines are extendable. The Secretary of State's involvement can significantly extend the review process.

- **Is there a standstill obligation?**

Transactions requiring UK notification do not technically need to receive clearance before a transaction can close even if the Secretary of State were to intervene on

public interest grounds. However, the Secretary of State and the CMA can impose obligations on parties to the transaction to prevent integration or to undo integration that has already occurred. In practice, therefore, parties should proceed with caution where merger thresholds are met and particularly if it is believed likely the Secretary of State may intervene in the review process.

- **Are there any sanctions?**

  There are fines for failing to comply with the CMA's information requests. It is also a criminal offence to intentionally alter, supress or destroy information that the CMA has required to be produced or to knowingly or recklessly supply false or misleading information to the CMA or the Secretary of State.

  Under the future FDI regime, companies that fail to report takeovers in their planning stages could face criminal sanctions in the form of imprisonment of company directors or large monetary fines.

- **Expected changes due to EU Screening Regulation 2019/452**

  Whilst not directly in response to the EU Regulation, the UK government has been considering its approach to the scrutiny of investments for some time. In December 2019, the UK government announced that, in order to protect national security, it intends to legislate to strengthen its existing powers to scrutinise and intervene in transactions. The National Security and Investment Bill proposes a voluntary notification system, similar to the United States, which would allow businesses to flag transactions that may give rise to national security concerns.

  Under the proposed legislation, the government would have increased powers to block or add conditions to transactions. The Bill also allows for sanctions to be introduced for non-compliance. The proposed legislation is intended to be separate from the current merger control regime meaning that it would apply across all sectors and to businesses of any size (regardless of turnover or market share).

FRANCE

- **What are the applicable thresholds?**

  Investments subject to the prior authorisation of the French Ministry of economy (the "Ministry") are:

- the acquisition of the control[3] (within the meaning of article L. 233-3 of the French *Code de commerce*) of a French entity;

- the acquisition in whole or in part of a business line of a French entity; and

- the crossing, directly or indirectly, alone or in concert with third parties, of the threshold of 25% of the voting rights in a French entity.

The first two cases apply to all foreign investors (including EU and EEA investors). The third case does not apply when the ultimate investor and all entities within the chain of control (between such ultimate investor and the French entity) are from (and domiciled in) an EU Member State or a state of the EEA having concluded with France a treaty on administrative assistance in tax matters and against tax fraud.

However, an investor is not required to apply for authorisation in certain specific situations:

- the investment is made between entities belonging to the same group;

- the investor crosses the threshold, directly or indirectly, alone or in concert, of 25% of the voting rights of an entity for which that investor had previously acquired control pursuant to a previous authorisation delivered by the Ministry;

- the investor acquires the control, within the meaning of article L. 233-3 of the French *Code de Commerce*, in an entity in which he acquired, directly or indirectly, alone or in concert, 25% of the voting rights pursuant to a previous authorisation delivered by the Ministry. In this case, the contemplated investment remains subject to a prior notification to the Ministry: the authorisation is deemed granted at the expiry of a 30-day period, unless the Ministry has raised objection within such delay.

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[3] A company is deemed to control another company (i) when it directly or indirectly holds a fraction of the capital granting it the majority of the voting rights at a general meeting; (ii) when it alone holds a majority of the rights in that company by virtue of an agreement entered into with other shareholders that is not contrary to the company's interests; (iii) when it effectively determines the decisions of the general meetings through its voting rights; (iv) when it is a shareholder of that company and has the power to appoint or dismiss the majority of the members of that company's administrative, management or supervisory bodies. It is also deemed to exercise such control when it directly or indirectly holds more than 40% of the voting rights and no other shareholder directly or indirectly holds a fraction larger than its own. Two or more persons acting in concert are deemed to jointly control another company when they effectively determine the decisions taken at its general meetings.

On 29 April 2020, the French Minister of Economy, Mr. Bruno Le Maire, announced his intention to decrease, temporarily, the authorisation threshold from 25% to 10% of the voting rights of French entities to protect French businesses in the context of the COVID-19 crisis. A decree shall be issued in the coming days to implement this measure. According to the information provided so far by the Ministry, this reinforcement of the authorisation regime should be applicable only in listed companies and should not apply to European investors. A special, faster authorisation process should also be implemented. This measure is expected to be applicable in the course of the second semester of 2020 up until 31 December 2020.

- **Which industries are affected?**

Activities affected by the French foreign investments rules are activities that (i) involve the exercise of public authority, (ii) may harm public order, public safety or national defence or (iii) are related to research, production or trading of weapons, munitions or explosive powders or substances. There is a list of specific sectors that fall within these activities:

1. Activities related to weapons, ammunitions, powders and explosive substances intended for military use or war material;

2. Activities related to dual-use goods and technologies listed in Appendix IV of the EU Regulation 428/2009;

3. Activities exploited by entities enabled with national defence secrecy;

4. Activities related to the security of informational systems, including its outsourcing, for an operator defined by article L. 1332-1 or L. 1332-2 of the French *Code de la* défense;

5. Activities related to means and performance of cryptology;

6. Activities exploited by entities having concluded a contract directly or by outsourcing, for the Ministry of Defence to manufacture a good or to perform a service relating to the activities of the industries aforementioned;

7. Activities relating to technical equipment or devices enabling the interception of correspondence or are designed for remote detection of conversations or the capture of computer data;

8. Activities related to the provision of services carried out by approved evaluation centres under the conditions provided by the decree related to the evaluation and certification of the safety offered by information technology products and systems;

9. Activities related to gambling with the exception of casinos;

10. Activities related to the means intended to deal with the illicit use of pathogenic or toxic agents or to prevent the health consequences of such use;

11. Activities related to the processing, transmission or storage of data who compromise or disclosure is likely to prejudice the exercise of the aforementioned activities;

12. Activities concerning infrastructures, goods or services essential to guarantee the integrity, safety or continuity of the energy supply;

13. Activities concerning infrastructures, goods or services essential to guarantee the integrity, safety or continuity of the water supply;

14. Activities concerning infrastructures, goods or services essential to guarantee the integrity, safety or continuity of the operation of transport networks and services;

15. Activities concerning infrastructures, goods or services essential to guarantee the integrity, safety or continuity of space operations;

16. Activities concerning infrastructures, goods or services essential to guarantee the integrity, safety or continuity of the operation of electronic communication networks and services;

17. Activities concerning infrastructures, goods or services essential to guarantee the performance of national police, national gendarmerie, civil safety services missions and public safety missions of customs services as well as certified private companies;

18. Activities concerning infrastructures, goods or services essential to guarantee the integrity, safety and continuity of the operation of an establishment, installation or a work of life-saving importance according to article L. 1332-1 and L. 1332-2 of the French *Code de la* défense;

19. Activities concerning infrastructures, goods or services essential to guarantee protection of public health;

20. Activities concerning infrastructures, goods or services essential to guarantee production, transformation or distribution of agricultural products when it contributes to the objective of national food safety defined by law;

21. Activities concerning infrastructures, goods or services essential to guarantee the editing, printing and distribution of political and general information press and online press services;

22. Activities relating to research and development activities when they are used as part of one of the aforementioned activities and are relating to critical technologies, including:

    – cybersecurity;

    – artificial intelligence;

    – robotics;

    – additive manufacturing;

    – semiconductors;

    – quantum technologies;

    – energy storage; and

    – biotechnologies.

23. Activities related to research and development of dual-use goods and technologies listed in Appendix I of EU Regulation 428/2009.

- **What is the filing process, and is clearance granted in writing?**

The application for clearance shall be filed by the investor with the Ministry. When the contemplated investment is to be made by one or more investors belonging to a chain of control, the application may be filed by one of the members of this chain on behalf of all the investors.

The information to be provided in the application for clearance is listed in a decree and includes information with respect to the investor (including the identity of the natural persons ultimately controlling such investor), the targeted entity (including a list of customers, a description of its activities, turnover and profits) and the investment itself (including the draft acquisition documentation or related term sheet).

Applications for clearance or a ministerial opinion shall be sent to the Ministry by electronic or regular mail.

The decision of authorisation or refusal shall be granted in writing by the Ministry.

After getting clearance, the Treasury Department shall be notified of the acquisition within two months from completion.

- **What are the review periods?**

Before making the investment, the investor can first formally ask the Ministry, with the prior consent of the targeted entity, whether the investment falls into the clearance process. The Ministry has two months to assess whether or not an authorisation will be required.

Otherwise, the time allocated to the Ministry to assess whether or not an investment requires authorisation and whether or not to grant such authorisation is 30 business days. However:

- if there is no response from the Ministry within 30 business days, the request is deemed to be rejected;

- in addition, the Ministry can decide within this 30-business-day period that an investment does require an authorisation but that an additional review is necessary to assess whether the national interest could be preserved by subjecting the authorisation to certain conditions.[4] In such a case, an additional 45-business-day period will apply to define and assess such conditions. However, the Ministry may still refuse to grant the authorisation during this additional 45-business-day period if it considers that the national interest could not be preserved, even if

[4] For instance, the Ministry can subject any subsequent sale or transfer of major assets of the French entity invested in to its prior authorization or request a prior notice in case of a change in the shareholding of the French entity invested in.

some specific conditions are required. No response within the 45-business-day period will also be deemed a refusal to grant the authorisation.

- **Is there a standstill obligation?**

  Yes, the transaction may not close during the review period. An investment made without the required authorisation may be subject to sanctions (see below).

- **Are there any sanctions?**

  The Ministry may implement injunctions if an investment is made without prior authorisation or if an authorisation has not been complied with.

  The Ministry may also implement interim sanctions if it assesses that the protection of the national interest is or may be put in jeopardy. Those interim sanctions are: (i) the suspension of the voting rights of the investor in the shareholders' meetings of the related French company, (ii) the preclusion or limitation of the distribution of dividends to such investor, (iii) the suspension of any disposal of assets, and (iv) the appointment, within the French company, of a representative in charge of protecting the national interest.

  Finally, in the case of certain breaches of the rules on foreign investments (investment made without prior authorisation, fraudulent obtaining of an authorisation, breach of the conditions of an authorisation and breach of an injunction), administrative fines may be applied by the Ministry. The amount of the fine must be proportionate to the gravity of the offence and may equal the greater of:

  - twice the amount of the non-complying investment;
  - 10% of the annual turnover (excluding taxes) of the company subject to the investment; and
  - €5 million for legal persons (€1 million for natural persons).

  Any failure to comply with clearance requirements is also punishable by five years of imprisonment, as well as the prohibition to exercise a commercial activity or to hold a public position in France.

  Finally, failure to notify the Treasury Department of the completion of the acquisition can be subject to a fine up to €750.

- **Expected changes due to EU Screening Regulation 2019/452**

  No additional changes are to be expected. The French government already implemented its latest reform to the Regulation in December 2019.

ITALY

Over the past few years, the Italian government has strengthened its power to screen FDI in key sectors of its economy. The Italian FDI screening framework is governed by the Law Decree No. 21 of 15 March 2012, as amended (the "Golden Power Law").

The COVID-19 pandemic has given further impetus to this process. On 9 April 2020, the Italian government issued Law Decree 23/2020, thereby partially amending the Golden Power Law to: (i) significantly increase the number of sectors where FDI is screened; and (ii) implement the changes required by the EU Regulation into Italian law.

Law Decree 23/2020 was converted into law by Law 40/2020 of 5 June 2020 with minor changes and clarifications.

- **What are the applicable thresholds?**

  Under the Golden Power Law, a filing must be made with respect to a transaction where:

  - an EU entity[5] acquires a controlling direct or indirect interest in a target active in any of the Covered Sectors (a "Covered Target"); or
  - a non-EU entity acquires any direct or indirect interest:
    - resulting in the purchaser controlling at least 10% of the voting rights in a Covered Target; or

[5] A "non-EU entity" is (i) any individual or legal entity that does not reside, have a registered office or administrative office or center of interests in the national territory/in any Member State of the EU or the European Economic Area ("EEA"); (ii) any individual or legal entity that resides, has a registered office, administrative office or center of interests in the national territory/in any Member State of the EU but is controlled, either directly or indirectly, by an individual or a legal entity under (i); (iii) any individual or legal entity that resides, has a registered office, administrative office or center of interests in the national territory/in any Member State of the EU or the EEA but has eluded the Golden Power Law.

- representing at least 10% of the corporate capital of the Covered Target.

In addition, the following must also be reported:

- follow-on transactions where non-EU entities' shares in a Covered Target increase and exceed certain key thresholds of the voting rights of corporate capital of the Covered Target (15%, 20%, 25% and 50%);

- transactions resulting in a change of ownership, control or availability of strategic assets held by entities within the Covered Sectors; and

- in respect of Covered Targets active in the national security or defence sectors, any transaction resulting in a non-Italian entity acquiring at least 3% (if listed) or 5% (if not listed) of the corporate capital of the Covered Target.

These thresholds are temporary and apply until 31 December 2020.

- **Which industries are affected?**

The Golden Power Law applies to transactions involving companies in the following industries and sectors:

1. Defence and national security;

2. Critical infrastructure (whether physical or virtual), in the energy, water, transport, health (including the production, import and distribution of medical/medical-surgical devices and personal protective equipment), communications, media, data processing/storage, aerospace, defence, electrical and financial fields, as well as the land and real estate necessary for the use of such infrastructure;

3. Supply of energy, raw materials and other critical inputs;

4. 5G technology;

5. Dual-use and other critical technologies, including robotics, semiconductors, aerospace, defence, nuclear technology, quantum technology, nanotechnology and biotechnology;

6. Agriculture and food security;

7. Media;

8. Banking, finance and insurance; and

9. Iron and steel.

Insofar as the sectors agri-food, iron and steel are concerned, the temporary regime under the Golden Power Law also applies to ensure employment levels and national productivity.

- **What is the filing process and is clearance granted in writing?**

Under the Golden Power Law, a notification filing must be made to the Department for Administrative Coordination of the Italian government within 10 days of certain events occurring, including (i) the adoption of corporate resolutions approving the relevant transaction; and (ii) the signing of the transaction documents relating to the transaction.

The filing (i) should be made using the forms available on the Italian government's website[6]; and (ii) should be made by the purchaser.

The Italian government may:

- issue a clearance for the relevant transaction; or
- block or impose conditions on the relevant transaction; or
- not do anything (in which case the transaction is deemed cleared).

Should parties fail to file a notification as required, the Italian government may independently initiate a review of the relevant transaction under the Golden Power Law.

The Golden Power Law also empowers the Italian government to impose a wide range of conditions on cleared transactions. Some of the conditions imposed so far include: (i) ensuring continuity of certain activities; (ii) specific industrial commitments; (iii) the mandatory appointment of Italian citizens to certain key posts within the target; and (iv) a joint committee (with members appointed by the

[6] http://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-att-goldenpower-moduli/9297.

purchaser and the government) tasked with verifying compliance with the conditions.

- **What are the review periods?**

  A review period of 45 business days will commence once the filing is made, and the Italian government determines that it has received all information necessary for the filing (the "Review Period"). The transaction may not close during the Review Period.

  The Review Period may be extended by:

  - 10 business days, if additional information is required from by the filing entity; or
  - 20 business days, if additional information is required from a third party.

  Once the EU Regulation has been implemented into national law, the Commission or other Member States may provide their opinion to the Italian government on a transaction under review. They may do so either at the request of the Italian government or on their own initiative. The Review Period will be suspended while the Commission or other Member States provide their opinion. These third-party opinions will not be binding on the Italian government.

- **Is there a standstill obligation?**

  Yes, the transaction may not close during the Review Period.

- **Are there any sanctions?**

  Breaches of the filing obligations may result in fines for the purchaser as follows:

  - a fine of not less than 1% of the cumulative global turnover of all entities involved in the transaction (with a cap equal to twice the value of the transaction); and
  - with respect to transactions involving 5G assets, a fine of not less than 25% of the cumulative global turnover of all entities involved in the transaction, up to a cap equal to 150% of the value of the transaction.

- **Are there any fines applicable?**

  Breaches of the filing obligations may result in fines for the purchaser as follows:

  - a fine of not less than 1% of the cumulative global turnover of all entities involved in the transaction (with a cap equal to twice the value of the transaction); and

  - with respect to transactions involving 5G assets, a fine of not less than 25% of the cumulative global turnover of all entities involved in the transaction, up to a cap equal to 150% of the value of the transaction.

  Moreover, in case of a breach of filing obligations and/or of conditions/ commitments imposed on the relevant transaction, the voting rights connected to the stake acquired are suspended until the conditions/commitments are fulfilled and any company deliberation adopted because of a key swing due to such votes is void.

  In case of the government's veto of the transaction, the voting rights connected to the stake acquired are suspended and the purchaser has the obligation to resell the acquired stake on the market within one year.

- **Expected changes due to EU Screening Regulation 2019/452**

  The Italian government already implemented the Regulation in its latest reform. Strategic assets and activities covered by investment screening are expected to be specified in a further governmental decree.

SPAIN

FDI in Spain is mainly regulated by the Royal Decree 664/1999 and the Law 19/2003.

As a response to the COVID-19 outbreak and the implementation of the EU Regulation, the Spanish government has significantly overhauled its FDI legislation by amending the Law 19/2003 and adopting the Royal Decree-Law 8/2020 of 18 March 2020 and the Royal Decree-Law 11/2020 of 31 March 2020.

- **What are the applicable thresholds?**

  In non-defence sectors, FDI screening is triggered when a foreign investor acquires (i) at least 10% of the share capital of or (ii) control over a Spanish company.

In defence sectors, all acquisitions must be filed with the government. Exceptions apply when the following cumulative conditions apply:

- the investment is made in a publicly listed company;
- the transaction value does not exceed 5% of the company's share capital; and
- the investor does not assume a management function in the company.

In defence sectors, all non-domestic investors are considered foreign.

In non-defence sectors, investors are considered foreign if they reside outside of EU/EFTA States or if they are effectively controlled by a non-EU/EFTA investor, which is assumed if the non-EU/EFTA investor holds more than 25% of the capital or the voting rights of the investor.

Investment transactions below €1 million in value are presently exempted from seeking authorisation before completion.

- **Which industries are affected?**

Foreign investments must be authorised before completion if they potentially affect public order, security or health in Spain. This is considered to be the case if transactions are carried out in the following sectors:

- defence and military, *e.g.*, production and trade of weapons, ammunition, explosives, *etc.*;
- critical infrastructure (physical or virtual) in the areas of energy, transport, water, health, communications, media, data storage and processing, aerospace, defence, finance and sensitive installations that are listed in the classified National Catalogue of Strategic Infrastructures according to Law 8/2011;
- critical technologies and dual-use products, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace technologies, defence, energy storage, quantum and nuclear, as well as nanotechnologies and biotechnologies;
- crucial supplies, particularly in the areas of energy, hydrocarbons, electricity, raw materials and food;

- sectors with access to or ability to control sensitive information, especially personal data; and

- media.

Foreign investment in any industry requires authorisation before completion if the foreign investor:

- is directly or indirectly controlled by the government of a third country, including public bodies or armed forces;

- has made investments or participated in activities affecting the security, public order or public health in another Member State; or

- has been subject to administrative or judicial proceedings related to criminal or illegal activities.

Additional laws restrict foreign ownership of domestic businesses in certain other sectors, for example in respect of audio-visual communications licences necessary for radio and television broadcast. In addition, investments carried out of tax havens as defined in Royal Decree 1080/1991 need to be reported before completion, though certain exceptions apply.

- **What are the review periods?**

FDI screening must be completed within **six months** after the notification has been submitted. The review period can be suspended if the government demands additional information.

The authorisation is **deemed to have been rejected** if an approval of the investment is not issued within the (extended) review period.

- **What is the filing process and is clearance granted in writing?**

Transactions that affect the sectors mentioned above require a mandatory filing with and approval by the government before completion.

All foreign investors must file a declaration about the investment after its completion for statistical purposes.

- **Is there a standstill obligation?**

  Investments that must be reported before completion are considered legally void until governmental authorisation has been granted.

- **Are there any sanctions?**

  Completing an investment without the necessary governmental authorisation is a serious infraction and can lead to a monetary fine of € 30,000 up to the value of the transaction. It can also lead to public or private reprimands.

- **Expected changes due to EU Screening Regulation 2019/452**

  The EU-Regulation 2019/452 has already been implemented into national law. However, additional adjustments can be expected in the coming months.

THE NETHERLANDS

Dutch law does not provide for general restrictions or an overarching framework for the review of FDI with the exception of specific sectors that are deemed vital from a security or public interest point of view.

However, legislation introducing general foreign investment screening is currently being drafted, but not expected before the final quarter of 2020 at the earliest. The Minister of Economic Affairs and Climate informed the Dutch parliament on 2 June 2020 that the future FDI screening regulation is intended to have **retroactive effect**, enabling the review of all relevant investments from 2 June 2020 up to the date of the entry into force of the new law.

Relevant investments would be those that concern (i) providers of vital processes and infrastructure as well as (ii) companies active in sophisticated sensitive technology. The review criteria to be applied are supposed to be comparable to those used in the Dutch Telecommunications Act (see below).

The Dutch government presently relies on regulating or protecting such vital sectors through:

- partial or full **ownership of or control over** vital companies; and

- **permit system**: certain permits may be revoked in the interest of national security or in the public interest.

- **Which industries are affected?**

  The following sectors do not address FDI screening in particular, but are considered vital for the national security or public interest in The Netherlands:

  - **Energy**, which is governed by the Mining Act (*Mijnbouwwet*), the Electricity Act 1998 (*Elektriciteitswet 1998*), and the Gas Act (*Gaswet*).

    Under the Electricity Act and the Gas Act, all the shares in companies responsible for the national high-voltage grid and the national transmission network, respectively, are in principle owned (directly or indirectly) by the state. There is a possible exception to this rule: a foreign institution that is responsible for the operation of a transmission system pursuant to national legislation (or its direct shareholder) can hold a part of the shares under certain conditions.

    The shares in the distribution systems operators for electricity and gas are held by municipalities and provinces, and must be owned in principle by the government pursuant to Art. 93 Electricity Act 1998 and Art. 85 Gas Act respectively.

  - **ICT/Telecom**, which is governed by the Telecommunications Act (*Telecommunicatiewet*, "TA").

    The House of Representatives of the Dutch Parliament is currently considering a proposal to amend the TA. Under the amended TA, the Minister of Economic Affairs and Climate shall be authorised to prohibit a party from acquiring or holding a controlling interest in a telecommunications company if and to the extent such controlling interest may pose a threat to public interest of The Netherlands. However, there can only be a threat to the public interest if the control leads to relevant influence in the telecommunications sector.

  - **Drinking Water**, which is governed by the Drinking Water Act (*Drinkwaterwet*);

    Only entities governed by Dutch public law (or entities wholly owned by such public entities) may exercise control over and hold interest in drinking water companies. Therefore, shares in drinking water companies cannot be held by (foreign) investors.

- **Nuclear**, which is governed by the Nuclear Energy Act (*Kernenergiewet*) and the Treaty of Almelo (*Verdrag van Almelo*).

  The nuclear sector is heavily regulated on safety, and key companies in this sector are either partly or fully state owned.

- **The defence** sector is run by the Ministry of Defence and does not allow for private (foreign) investors.

- **What are the applicable thresholds?**

  There are no general monetary or other thresholds other than specifically stated in the provisions governing the mining and electricity sectors:

  - **Mining**

    Under the Mining Act, mining activities (detection and extraction of gas and crude oil) on or under Dutch soil may only be performed by State-owned companies, *i.e.*, companies in which the State has a shareholding through the state-owned company *Energie Beheer Nederland* ("EBN") of 40%. The remaining 60% of the shares may be held by one or more private and foreign entities.

    Holders of extraction permits are obligated to enter into certain mine construction agreements with EBN under which EBN is entitled to veto the respective permit holder's decision to (i) outsource mining (construction) activities, or (ii) enter into any obligations with respect to supply and transport of natural gas.

  - **Electricity**

    Under the Electricity Act, any party involved in a (direct or indirect) change of control (within the meaning of the Dutch Competition Act) over production plants with a capacity of 250 megawatts or more is required to notify the Ministry of Economic Affairs and Climate ("Ministry").

- **Which business activities are subject to the permit system?**

  The following business activities are controlled through a permit system under the administration of the Minister of Economic Affairs and Climate:

- **mining activities** (detection and extraction of gas and crude oil), and
- **underground storage of gas** in The Netherlands.

The Ministry may revoke permits on grounds of endangerment of national security or national defence which is not necessarily linked to a change of control. FDI in permit-holding entities may result in the Minister revoking a permit, if such investment is considered being in conflict with interests of national security or national defence.

Under the Electricity Act and the Gas Act, a supply permit is required for the supply of electricity or gas to low-volume users. A permit may be revoked by the Ministry should the permit-holder no longer be able to satisfy the demand and/or threaten to discontinue its services.

- **Is there a standstill obligation?**

There is currently no standstill obligation under Dutch law.

The Dutch government is discussing a legislative proposal aimed at implementing a "standstill period" into Dutch corporate law. Under the proposal, additional means to hold off potential (hostile) takeovers may be granted to Dutch-listed companies, and the board of directors of a listed company may invoke a standstill period of a maximum of 250 days if:

- a public offer on its shares is announced;
- such offer has not been agreed with the board of directors of the company; and
- the board of directors deems such offer to be materially in conflict with the interest of the company and the continuity, independence, identity or development of the company is in jeopardy.

During this period, no members of the board of directors or the supervisory board may be appointed, suspended or dismissed.

- **Are there any fines?**

The sector-specific regulations do not provide for any fines.

Under the proposed TA, any change of control in violation of a prohibition is declared void. Not complying with a notification requirement shall be subject to fines.

- **Expected changes due to EU Screening Regulation 2019/452**

  So far, the Dutch government has not implemented an overarching regulatory framework with respect to FDIs entering in the context of the EU regulation on establishing a framework for the screening of FDIs entering into the EU.

  It can, however, be expected that the intended new FDI regime will take account of the key provisions of the EU Screening Regulation; the proposed criterion of "vital infrastructure" would largely correspond to the EU Screening Regulation's "critical infrastructure".

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Please do not hesitate to contact us with any questions.

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